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I. INTRODUCTION

In recent months, a number of commentators have called for the abolition—or very substantial retrenchment—of the Federal Communications Commission (FCC or Commission).[1] Last October, four new FCC Commissioners, including a new Chairman, completed an extraordinary con-

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1. *See* Peter Huber, LAW AND DISORDER IN CYBERSPACE: ABOLISH THE FCC AND LET COMMON LAW RULE THE TELECOSM (1997); Thomas G. Krattenmaker, *The Telecommunications Act of 1996*, 49 FED. COMM. L.J. 1 (1996); HERITAGE FOUNDATION, ROLLING BACK GOVERNMENT (1995); PROGRESS AND FREEDOM FOUNDATION, THE TELECOM REVOLUTION: AN AMERICAN OPPORTUNITY (1995).

firmation process which saw them grilled on issues ranging from universal service to spectrum auctions; hauled into senators' private offices for meetings to discuss pending administrative proceedings and litigation strategy; and subjected to all manner of "holds" before finally being approved by voice votes or, in the case of the Chairman, a recorded vote of 99 to 1. Heightened scrutiny, if not downright bludgeoning, of would-be commissioners by Congress was directed against what was, arguably, by U.S. standards, the most qualified slate of FCC nominees ever proposed by an administration—consisting of the FCC's general counsel, a congressional staff economist with real expertise in the subject matter, a former state regulator, and a former Justice Department antitrust lawyer.

There is more than a little irony in all of this furor over one of the oldest of the so-called "alphabet agencies." Calls for eliminating the FCC come at a time when the agency is in the process of implementing the massive Telecommunications Act of 1996 (Act or 1996 Act).[2]

The old adage that "where one stands depends on where one sits" certainly holds true with respect to reform of the FCC. In essence, the debate is between those who hold what might be termed the traditional liberal view and those who are conservatives, or "second-look" liberals. The former are skeptical of marketplace forces and confident of the abilities of regulators to out-perform markets. They favor an expansive, interventionist regulatory agency with broad legislative authority. The latter believe the industry should be governed by consumer-citizen preferences reflected through markets and therefore favor a more limited, less intrusive agency which essentially administers and implements policy established by Congress.[3] What constitutes "undue" process, overlapping jurisdiction, redundant regulation, and unnecessary expenditures for the latter are seen as important safeguards and processes by the former.

Notwithstanding these philosophical differences, there are, especially in this period of budget constraints, legitimate questions about how the modern FCC should be structured, and how much process and regulation we can afford. In large part, it is a question of establishing administrative priorities; that is, doing the things that have to be done—and have to be done by the *federal* regulator. The 1996 Act has established new priorities

2. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.A. (West Supp. 1997)).

3. Of course, few people fall neatly into one category or the other. For example, one may believe marketplace forces are adequate to ensure the presentation of diverse viewpoints in mass media markets but favor government intervention to ensure (subsidize) universal telephone service. This has resulted in collective support, at least among politicians, for the traditional liberal view of regulation (and government generally) and explains why basic reforms have been rarely recommended and difficult to achieve.

for the FCC which, along with spectrum allocation, should be where the Commission directs its "scarce" resources.

Like it or not—and one's views on whether we need an FCC are difficult to disentangle from what one thinks about the agency's personalities and policies—the FCC is not going away any time soon. There are legitimate needs for a federal telecommunications regulator, at least for the foreseeable future. Focusing on elimination of the FCC is doubly dangerous. First, it needlessly polarizes the debate about FCC reform—a debate which certainly is important and long overdue. Second, it tends to minimize other approaches to major structural reform of the agency which are more relevant and at least relatively more realistic.

On the other hand, upon careful consideration, the spectacle of qualified nominees running the gauntlet of conflicting political agendas under the guise of advice and consent reveals serious flaws in the traditional structure of the agency. Much of the Congressional concern about the FCC goes to the agency's accountability. Every legislator wants the FCC to be mindful of his or her views and constituent interests. Yet, under the traditional model, accountability tends to be achieved at the expense of effectiveness. Accountability often means making it difficult for the agency to do the "wrong thing" and, as a result, making it virtually impossible for it to do the "right thing." This might be termed "negative accountability," or accountability by stalemate and paralysis. In the discourse about FCC reform, little has been said about changes that might result in "positive accountability," that is, accountability without the adverse effects of the current system.

Agreeing that there is a need for an FCC does not imply that the FCC we need is one structured as the agency is today.[4] Indeed, this article pro-

4. While this Article focuses on the governance structure for the agency (i.e., whether it can be more effective and efficient headed by a single administrator than a multimember commission), there are obviously other "structural" issues that should be considered.

One area which should be carefully examined is the FCC's jurisdiction over mergers, at least those that do not involve the transfer of broadcast licenses. In the general economy, mergers are reviewed by one or more antitrust authorities (e.g., the Department of Justice, the Federal Trade Commission, and various state attorneys general). The focus of these authorities is on whether a proposed merger or acquisition would lessen competition in the relevant market. However, when a merger is proposed involving firms which hold spectrum licenses, the FCC must give its approval as well, determining whether the transfer of control of the licenses is "in the public interest." The question is: What does this additional layer of review add, or why do we treat firms that use the spectrum differently from those that use newsprint, memory chips, or steel to produce a product or render a service?

The legal theory is that the use of the spectrum carries with it some special responsibilities and obligations. This theory also holds that the spectrum "belongs to the people" and that licensees use it only as "public trustees." This thinking has its roots in the government's administration of broadcast spectrum, where, early on, the decision was made to

poses a fairly radical reform—replacing the multimember FCC with a single administrator.[5] The objective of this reform is to reduce costs (both direct and indirect), improve the quality of decisions, and promote positive accountability. While this Article acknowledges the pros and cons, it does, in the end, strongly advocate change.

II. A SELECTIVE HISTORY OF THE FCC

After a brief attempt at informal regulation of the radio spectrum by the Commerce Department,[6] Congress, in 1927, established the Federal Radio Commission (FRC) and gave it authority to regulate the use of the spectrum. The FRC could issue a license in any case where it determined "the public interest, necessity or convenience would be served."[7] While the 1927 Radio Act barred the new FRC from engaging in censorship, it did restrict licensees' use of the airwaves, including a requirement of

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award licensees by regulatory process rather than by market mechanisms. The theory that supported broadcast licensing became the theoretical foundation for the licensing of all spectrum (e.g., business radio, private microwave, etc.). The FCC's authority in this respect has never been seriously reviewed by Congress. *See generally* THOMAS G. KRATTENMAKER & LUCAS A. POWE, REGULATORY BROADCAST PROGRAMMING (1994).

Of course, a number of things have changed since the 1920s which call into question the continued relevance of the underlying theory and certainly its expansion by the FCC over the years to form a basis for agency review of telecom mergers. First, there is the fundamental question of whether use of nonbroadcast spectrum should be governed by the same theory as broadcast spectrum. In reality, applications for the use of most nonbroadcast spectrum are routine. Rules relating to allowable levels of power, coverage area, and so forth are straightforward. Does the use of a business radio license to dispatch trucks on service calls, a microwave license to transport cable programming or telephone calls, or a satellite license to send and receive data require a finding, even in the first instance, that the user is an appropriate public trustee?

The FCC has, nevertheless, used this rather small hook to hang up some very big mergers. For example, in 1997, the FCC refused to approve the merger of Bell Atlantic and NYNEX, which had been approved by the Justice Department and a number of state regulatory commissions, until the companies agreed to certain conditions which the Commission proposed relating to local competition. The FCC Chairman also took the unusual step of opposing a possible merger of AT&T and SBC, before it was even formally announced by the parties.

5. At a 1996 Senate hearing on FCC oversight and reform at which the Author testified, Albert Halprin, former Chief of the FCC's Common Carrier Bureau, also advocated the move from a multimember Commission to a single administrator. While not specifically endorsing a single administrator, Dennis Patrick, a former FCC Chairman, testified to the need to reduce the size of the Commission. *Federal Communications Commission Oversight and Reform: Hearing Before the Senate Comm. on Commerce, Science, and Transportation*, 104th Cong. (1996).

6. *See* United States v. Zenith Radio Corp., 12 F.2d 614 (N.D. Ill., 1926); *see also* R.H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1 (1959).

7. Radio Act of 1927, ch. 169, 44 Stat. 1162, *repealed by* Communications Act of 1934, ch. 652, § 602(a), 48 Stat. 1064, 1102 (codified as amended in scattered sections of 47 U.S.C.A. (West 1991 & Supp. 1997)).

"equal opportunities" for political candidates. The FRC was created with five members, in part to avoid the "political interference or arbitrary control" that might result from a single administrator.[8]

In 1934, the Roosevelt administration sought legislation to transfer the FRC's powers to a new seven-member Federal Communications Commission that was also to be given jurisdiction over the telephone and telegraph industries, which was being exercised at the time largely by the Interstate Commerce Commission. The new statute, enacted within several months after it was submitted, was largely a recodification of the 1927 Radio Act and the Interstate Commerce Act.

In the sixty-four years since the FCC was established, it seems to have been taken for granted that the traditional multimember structure is the most efficient and effective.[9] The major reviews of the independent regulatory commissions (including the FCC) did not directly address this issue, although they did identify a number of structural and procedural problems with these agencies.[10]

One such review was completed in 1949 by a commission headed by former President (and Commerce Secretary) Herbert Hoover.[11] In 1960, retired Federal Judge James Landis compiled a report on the regulatory agencies for President-elect John F. Kennedy.[12] Finally, in 1971, the Presi-

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8. *See* ERWIN G. KRASNOW ET AL., THE POLITICS OF BROADCAST REGULATION 12 (3d ed. 1982) (quoting S. REP. NO. 69-772, at 2 (1926)). In a 1930 law review article, the Chairman of the American Bar Association's Committee on Communications, a former General Counsel of the FRC, called for a "Radio Czar" rather than a commission, expressing a concern that a multimember commission "would inevitably clash and would neutralize each other." Louis G. Caldwell, *The Standard of Public Interest, Convenience or Necessity as Used in the Radio Act of 1927*, 1 AIR L. REV. 295, 296 (1930).

9. This is the case despite the fact that during this period a number of regulatory bodies headed by a single administrator were created (e.g., the Environmental Protection Agency). There does not appear to be a clearly stated or consistent rationale for choosing one structure over the other.

10. The structure of the FCC became a legislative issue, when Congress first began to address the need for revamping the Communications Act in the late 1970s. At that time, legislation proposed in the House of Representatives included provisions that would have renamed the agency and reduced the number of commissioners to five. While complete rewrites of the 1934 Act were not enacted at that time, portions of the proposed bills eventually found their way into law or regulation, including the reduction in the number of commissioners. *See* Omnibus Budget Reconciliation Act of 1982, Pub. L. No. 97-253, 96 Stat. 763. However, to date, Congress has not considered replacing the multimember FCC with a single administrator.

11. *See* COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF GOVERNMENT, THE INDEPENDENT REGULATORY COMMISSIONS, A REPORT TO CONGRESS (1949) [hereinafter HOOVER COMMISSION REPORT].

12. SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE OF THE SENATE COMM. ON THE JUDICIARY, 86TH CONG., REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT (Comm. Print 1960) (authored by James M. Landis) [hereinafter LANDIS

dent's Advisory Council on Executive Organization—popularly referred to as the Ash Council—examined the independent regulatory agencies.[13]

The Hoover Commission Report focused on organizational issues related to the independent agencies. The Report did not directly address the issue of a single administrator versus a multimember commission, but did find that administration of an agency was "distinctly superior" when vested in the chairman and urged the appointment of an executive director to support the chairman.[14] In addition to improving the efficiency of the agency, this approach would also "center responsibility for the functioning of the commission" (i.e., improve accountability).[15] In that same vein, the Hoover Commission Report viewed the chairman as the agency's "principal spokesman before the Congress as well as before the executive branch."[16]

The key reforms proposed by Landis were (1) to increase the authority of the chairman of each agency; and (2) to increase the accountability of each chairman to the President.[17] In these respects, Landis, like the Hoover Commission, clearly favored the "strong chairman" (or *primus inter pares*) model. Interestingly, Landis was unwilling to take the next step along the continuum—a single administrator.

The Landis Report skirted some other tough issues. For example, in a section entitled "Administrative Organization," Landis acknowledged proposals to separate "policy" functions from adjudicatory functions. However, he ultimately believed that the regulatory process was too complex to make such simple distinctions.[18] Moreover, Landis concluded that it was "unsafe to speculate broadly upon the appropriate organization of the regulatory agencies"[19] because the industries they regulate are so different. This conclusion begs the question of how each agency might be better structured to deal with its particular mandate. This question is even more pertinent when, as arguably with the FCC today, the mandate changes over time.

REPORT].

13. PRESIDENT'S ADVISORY COUNCIL ON EXECUTIVE ORGANIZATION, A NEW REGULATORY FRAMEWORK: REPORT ON SELECTED INDEPENDENT REGULATORY AGENCIES (1971) [hereinafter ASH COUNCIL REPORT].

14. HOOVER COMMISSION REPORT, *supra* note 11, at 5-6.

15. *Id.* at 6.

16. *Id.* The Commission also recommended that members of all independent agencies be removed only for cause and called for a change in the statute to extend this protection to the FCC. *Id.*

17. LANDIS REPORT, *supra* note 12, at 65.

18. *Id.* at 17-22.

19. *Id.* at 20.

While Landis focused primarily on internal organizational issues, he did touch on matters which bear directly on the structural reform recommended in this Article. Landis noted that the sheer volume and complexity of decisions agencies are called upon to make mean that commission members must delegate much of the decision-making process to staff. With a bluntness that typifies his report, Landis wrote that, unlike federal judges, commissioners "do not do their own work. The fact is that they simply cannot do it."[20] He noted that "delegation on a wide scale, not patently recognized by the law, characterizes the work of substantially all the regulatory agencies . . . . Absent such delegation, the work of these agencies would grind to a stop."[21] Landis suggested that "[t]he real issue . . . is whether to recognize openly this fact of delegation or continue with the present facade of non-delegation . . . ."[22]

If the effective operation of the FCC entails delegation of decision making and opinion writing to staff and means that commissioners are often left to "rubber stamp" deals worked out at the staff level, there appears to be less need for a multimember structure. A proficient, expert staff directed by a highly competent administrator might be expected to produce decisions that are at least no worse than those produced by a multimember agency. The real questions, then, are what benefits, if any, result from the participation of other commissioners (or, more accurately, their staff) in formulating agency decisions, whether those benefits are more apparent than real, and what costs are associated with the multimember structure.[23]

In a section dealing with the FCC, Landis was especially harsh. While praising the "technical excellence" of its staff, he criticized the Commission for inaction, susceptibility to influence by ex parte contacts (i.e., "capture" by the regulated industry, especially the broadcast networks), and subservience to Congress.[24] After such a strong indictment, Landis offered only a modest remedy—providing the FCC with "strong and competent leadership."[25]

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20. *Id.* at 19.

21. *Id.* at 20.

22. *Id.*

23. The Landis Report also found considerable overlapping jurisdiction among regulatory agencies, principally in the area of antitrust. Landis cited the FCC's jurisdiction over issues of "monopoly" as one example. He recommended better coordination or simply eliminating the overlaps. *Id.* at 29, 86; *see also supra* note 4 (discussing FCC review of telecommunications mergers).

24. LANDIS REPORT, *supra* note 12, at 53-54.

25. *Id.* at 54. President Kennedy certainly followed this advice by nominating Newton Minow as Chairman. Minow proved himself to be one of the most competent and controversial Chairmen in the agency's history. He was also willing to take on the broadcasters as evidenced by his famous "vast wasteland" speech delivered to the National Association of

In 1971, the Ash Council completed its review of the independent agencies. Like its predecessors, the Ash Council report focused on issues such as the quality of appointments and concerns about "industry capture." However, the report recommended no changes in the bipartisan, multimember structure of the FCC.[26]

Given the time that has passed since the last thorough review of the independent regulatory agencies generally, and in light of the passage of the 1996 Act, it is timely to reconsider the structure of the FCC.

III. THE CASE FOR A SINGLE ADMINISTRATOR

The case for reform of the FCC must start with an assessment of the appropriate role for federal regulation in the modern telecommunications and mass media environment. In other words, structure should be derived from mandate, rather than the other way around.

The structure of the FCC should be that which is most relevant to carrying out its responsibilities effectively and efficiently.[27] Since the FCC's authority has changed significantly, especially within the last decade, it is timely to review the agency's structure. In particular, the FCC's chief tasks today include implementation and enforcement of the clear procompetitive policy set out in the 1996 Act. The FCC is also responsible for administering spectrum auctions, including auctions for new broadcast spectrum, and enforcing the terms of spectrum licenses. While Congress has still left a great deal to the agency's discretion,[28] it has clearly established the major

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Broadcasters' convention in 1961.

26. ASH COUNCIL REPORT, *supra* note 13, at 14.

27. It is precisely for this reason that proposals to abolish the FCC are so irrelevant. Congress has given the FCC a large amount of work to implement the 1996 Act, leaving many important details to be worked out by the expert agency.

28. Congress should also consider whether "the public interest" standard for decision making is too vague and leaves too much discretion with the FCC. This is not a new concern, especially as it relates to FCC regulation of broadcast speech. *See* Glen O. Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67, 125 (1967) ("Perhaps more basically troublesome than the encouragement of conformity is the fact that it is impossible to tell whether the Commission is in fact making value judgments about programming while its published opinions deny that it is doing so."); David L. Bazelon, *FCC Regulation of the Telecommunications Press*, 1975 DUKE L.J. 213, 215 ("The licensing scheme mandated by the Federal Communications Act permits a wide-ranging and largely uncontrolled administrative discretion in the review of telecommunications programming. That discretion has been used, as we might expect and as traditional First Amendment doctrine presumes, to apply sub silentio pressure against speech . . . ."). As yet another commentator has noted:

> It is hard to reconcile such governmentally imposed requirements with the traditional concept of the freedom of the press. The broadcast model assumes that the government has a positive role to play as licensor and regulator. The optimistic notion that government is to play that role on behalf of citizen freedom rather

tasks the FCC must perform.[29] The question is whether a single administrator or a multimember Commission is better suited to carry out these responsibilities.

The answer requires analysis along three relative dimensions: cost, effective decision making, and accountability.

A. *Costs*

The relative costs of a single administrator and a multimember Commission are important considerations.[30] Any proper cost-benefit analysis identifies beneficial and adverse consequences of a particular approach to determine the existence and magnitude of any *net* benefits, and then compares net benefits with added costs.

Any multimember commission starts out in a hole, so to speak, since it clearly entails additional costs and, thus, must produce sufficient net benefits to cover those added costs. The costs involved are both direct and indirect. Examples of direct costs are each additional commissioner's salary and benefits (health, retirement, etc.), office space, personal staff compensation, and travel expenses. Estimates of these costs in the case of the FCC amount to about one million dollars annually for each commissioner's office.

There are also greater indirect costs with the multimember structure. The costs of simply reaching a decision, let alone achieving consensus or unanimity, clearly increase as the number of decision makers increases. Collective decision making entails interoffice coordination, negotiations, and multiple consultations with agency staff, as well as the costs of holding official meetings (e.g., meeting room, sound system, provision for telecast, and overflow seating). Another considerable indirect cost is the delay associated with gaining support for a particular outcome.

In addition, costs of private parties and other governmental authorities with stakes in the regulatory decisions are also greater. Interested parties will typically lobby multiple offices and incur the costs of "tailoring" their messages rather than simply filing generic comments with the agency.

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than against it is not persuasive to those who are skeptical about the power of good will in political processes to guarantee good results.

ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM 135 (1983).

29. For example, the FCC is required to oversee the establishment of prices for "unbundled network elements" and to implement the new universal service mandate of the 1996 Act. Telecommunications Act of 1996, sec. 101(a), § 251, 47 U.S.C.A. § 251 (West Supp. 1997).

30. Costs, in this context, refer to the resources needed to operate the agency rather than any adverse consequences that flow from operating in a particular fashion.

Costs incurred in identifying, screening (FBI background checks, etc.), and confirming suitable candidates to fill added commissioner slots are also multiplied. This process often involves trading political favors with key legislators who will be called upon to confirm the nominations and, as a result, can produce delays until acceptable combinations of nominees are proposed.[31]

In the latter regard, while it is a point that bears on the substantive consequences of having a multimember commission, there are likely to be considerable differences in the selection and confirmation process under a multi- versus single administrator regime. In either case, the process is, by nature, a political exercise. Candidates tend to be people with political connections, often having worked directly in political campaigns or in professional staff positions for politically prominent individuals.[32] This is not to say, however, that the political dynamics of the two processes are comparable.

Consider the following example. In 1969, President Nixon nominated Dean Burch, the former Chairman of the Republican National Committee and a protégé of the ultra-conservative Senator Barry Goldwater, to be FCC Chairman. In 1993, President Clinton selected Reed Hundt, a Washington lawyer with very close political and fundraising ties to Vice President Al Gore, to head the agency. While both Burch and Hundt were successfully confirmed (and proved to be distinguished, if controversial, Chairmen), it is far less likely that they would have survived the process (or have been nominated in the first place) had there not been other members of the Commission to counterbalance them.

While having a single administrator will not necessarily ensure a less political selection process, it can be expected that, at least over time, the criteria used for selection of a single administrator would comport more closely with position-relevant characteristics. For example, it has been

31. Frequently during the last decade, the FCC has operated for substantial periods of time with less than a full complement of commissioners for political reasons.

32. In the 1970s, the Senate Commerce Committee commissioned an analysis of appointments to the FCC and Federal Trade Commission which found that: "Partisan political considerations dominate the selection of regulators to an alarming extent. Alarming in that other factors—such as competence, experience, and even, on occasion, regulatory philosophy—are only secondary considerations." SENATE COMM. ON COMMERCE, 94TH CONG., 2D SESS., APPOINTMENTS TO THE REGULATORY AGENCIES: THE FEDERAL COMMUNICATIONS COMMISSION AND THE FEDERAL TRADE COMMISSION (1949-1974) 391 (Comm. Print 1976) (prepared by James M. Graham & Victor H. Kramer). There has been considerable criticism over the years (by the American Bar Association, among others) of the quality of regulatory appointments. To the extent the problem is endemic to the U.S. political system, it may be too much to expect nominees who are completely "above politics." However, in view of the likely outcome, it *is* desirable to have an agency structure that enhances accountability and efficient, timely decision making.

generally true that the Assistant Attorney General for Antitrust has been an antitrust or industrial organization expert.[33] On the other hand, it has been rare that an FCC commissioner, let alone a chairman, had significant experience in telecommunications or even in the direct management of a large organization.

As noted, with multimember commissions, "strategic" selections are much more likely; that is, selections which satisfy particular political interests or offset (neutralize) other commission members. When there is more than one opening, the tendency is to put together a slate of candidates who collectively can pass political muster and can be expected to cancel each other out.[34] With expectations such as these, it is hardly surprising to see sometimes bitter and often intensely personal, rivalries surface, which do little to improve the quality of life or of substantive decisions at the FCC.[35] The result is the politicization of otherwise nonpolitical ("technical") issues and decisions.

B. Decision Making

The analysis of the impact of the two approaches on decision making is more complex and tends to be more subjective. There are two ways in which a multimember structure can affect the quality of decisions made by the agency. First, individual commissioners may contribute to better decisions by force of intellect, professional training, and experience. Multiple members bring a diversity of viewpoints. Second, having multiple commissioners may reduce the likelihood of "bad" decisions by exercising a check on any single administrator, especially the chairman.[36]

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33. *See* William E. Kovacic, *The Quality of Appointments and the Capability of the Federal Trade Commission*, 49 ADMIN. L. REV. 915, 948 (1997) ("Replacing a multimember structure with a smaller number of commissioners or a single administrator probably increases the likelihood that more nominees will be highly qualified.").

34. *Id.* at 948-49.

> There are several approaches for improving the quality of regulatory agency appointments. One approach is to . . . convert multi-member commission structures to leadership by one administrator. [This] curbs the ability of Congress or the executive branch to endorse candidates with weak qualifications. As the number of commission members declines, it becomes more difficult for the President to justify poor appointments by arguing that at least some commissioners are qualified and can be relied upon to guide the agency on matters of substance.

Id.

35. *See In-Fighting at FCC Grows Hotter with Exchange of Contentious E-Mail*, WASH. TELECOM WK., Sept. 26, 1997, at 1; *Quello Fires Final Blast at Chmn. Hundt on First Amendment Issues*, COMM. DAILY, Oct. 27, 1997; Chris McConnell, *Quello Fires at Hundt*, BRDCST. & CABLE, June 30, 1997, at 24; *Quello Blasts Hundt on First Amendment Views*, COMM. DAILY, June 27, 1997; Harry A. Jessell, *Family Feud at the FCC*, BRDCST. & CABLE, Dec. 23, 1991, at 4.

36. For a period of 17 months during 1987 to 1989, as a result of unfilled vacancies,

Does a multimember structure result in more "good" decisions? In the case of the modern FCC, it is not at all clear that it does. As noted, most decisions are prepared by the staff, usually in consultation with the chairman's office. Typically, other commissioners have little input until a draft "item" is circulated prior to adoption. Even at that point, individual commissioners (including the chairman) have little actual input into the document.

Commissioners obviously have leverage. The fact that the chairman needs a majority and/or may want to appease a particular interest group or key politician with "ties" to a commissioner produces some compromises. It is less obvious, however, whether the compromises produce better decisions. In fact, largely as a result of the need to accommodate disparate views, FCC decisions have become formulaic, typically reveal very little of the Commission's "thinking," and offer little by way of insight into underlying philosophy. They consist of a lengthy section summarizing the positions taken by the parties followed by a typically shorter statement establishing the Commission's position. They serve primarily as announcements of the action taken, rather than well-reasoned statements of principle.[37] Precisely because the outcome is often the product of a last-minute consensus, the decisions are often a patchwork of pieces, each intended to satisfy some (internal or external) interest. Granting the staff "editorial privileges" following adoption of an item has become a euphemism for stitching together the necessary pieces after the fact.

The deterioration of decision making at the FCC is also apparent in the declining quality of dissenting opinions. At one time, dissents were logical, well-written, scholarly opinions which reflected clear philosophical differences with the majority (usually chairman-driven) position.[38] To-

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the Commission functioned with only three members. During this period, the Chairman was ostensibly able to exercise more control, since he needed only one additional vote to produce his favored result. However, at the same time, each of the other two commissioners had greater bargaining power as well. While it is difficult to judge whether the resulting decisions were any better, the FCC certainly was able to function effectively with fewer than the full complement of commissioners.

37. Judge Posner observed of the Commission's decision to revise the financial interest and syndication rules:

> The Commission's majority opinion . . . is long, but much of it consists of boilerplate, the recitation of the multitudinous parties' multifarious contentions, and self-congratulatory rhetoric about how careful and thoughtful and measured and balanced the majority has been in evaluating those contentions and carrying out its responsibilities. Stripped of verbiage, the opinion, like a Persian cat with its fur shaved, is alarmingly pale and thin.

Schurz Comm., Inc. v. FCC, 982 F.2d 1043, 1050 (7th Cir. 1992).

38. An example of such a dissent was Commissioner Glen Robinson's scathing indictment of the FCC's comparative license renewal process. *See* Cowles Fla. Brdcst., 60

day, dissents are largely statements of disagreement with the majority and are often simply scripts of comments made at the FCC's open meetings (which are, themselves, neatly choreographed events rather than occasions for genuine give-and-take).[39]

By contrast, decisions rendered by a single administrator are likely to reflect a clear philosophy, be internally consistent, and present a more logical policy roadmap. A single administrator has nowhere to hide. There is no internal consensus to build or deal to cut.[40]

But, if multimember commissions tend to water down good policies, can they not water down bad policies as well?; that is, serve as a check on a single administrator who may be inclined to "do the wrong thing?" The answer is: "Of course." The analysis, however, cannot stop there.

In the first place, checks and balances are worthwhile, if they truly check abuses and offset the power of vested interests. They may be worth little, if they serve largely to prevent needed reforms and become a means of extracting some unwarranted governmental favor.[41] Moreover, the incremental value of any particular set of checks and balances depends on

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F.C.C.2d 372, 430-433, 37 Rad. Reg. 2d (P & F) 1487 (1973).

39. The Government in the Sunshine Act, Pub. L. No. 94-409, § 2, 90 Stat. 1241 (codified at 5 U.S.C. § 552b (1994)), was enacted in 1976. In essence, the Act requires federal agencies headed by boards (two or more persons) appointed by the President to open "every portion of every meeting" to the public unless there is a valid reason for closing them. Whatever benefits the Sunshine Act may have produced, it has virtually eliminated Commission meetings as a meaningful part of the decision-making process. Points of contention are no longer debated in public, but are resolved prior to meetings in *closed* sessions of Commission staff or even by notation (or "on circulation" in the parlance of the FCC) in part to avoid the notice and other procedural requirements of open meetings. FCC meetings involve virtually no collegial interaction and have no bearing on the outcome. Replacing the Commission with a single administrator, and thereby removing the agency from the requirements of the Sunshine Act with respect to open meetings, would be a long-overdue acknowledgment that this particular "emperor" has no clothes. Indeed, the deterioration in decision making may well be adequate grounds for repealing the Sunshine Act altogether.

40. This also produces greater accountability, as discussed in Part III.C.

41. One penetrating analysis put it this way:

> By definition, government's power to solve problems comes from its ability to reassign resources, whether by taxing, spending, regulating, or simply passing laws. But that very ability energizes countless investors and entrepreneurs and ordinary Americans to go digging for gold by lobbying government. In time, a whole industry—large, sophisticated, professionalized, and to a considerable extent self-serving—emerges and then assumes a life of its own. This industry is a drain on the productive economy, and there appears to be no natural limit to its growth. As it grows, the steady accumulation of subsidies and benefits, each defended in perpetuity by a professional interest group, calcifies government. Government loses its capacity to experiment and so becomes more and more prone to failure.

JONATHAN RAUCH, DEMOSCLEROSIS: THE SILENT KILLER OF AMERICAN GOVERNMENT 17 (1994).

what others exist.

In the case of the FCC, it can be argued that there is a surfeit of due process—in fact, an infinitely elastic supply of legal process, or what one FCC commissioner termed "undue process."[42] The seeming preoccupation with process over progress is difficult to defend. The result is that a number of genuinely efficiency-enhancing reforms have been all but impossible to achieve. Indeed, a multimember commission is often faced with the "prisoners' dilemma." Regulators might all be inclined to agree that a politically difficult step is worth taking in the same way that prisoners might agree that it would be best not to confess. The problem is that if one nevertheless confesses/opposes taking the controversial step, there are powerful incentives compelling the others to go along. United they stand; divided they fall. A single administrator cannot be *divided* in this sense and may thus be more likely to make wise but politically unpopular decisions.[43]

The putative benefit of multimember commissions is precisely that they thwart effectiveness—they compel compromise and sacrifice of principle. Rule makings become exercises in mollifying competing internal factions or "cutting a deal."[44] From the standpoint of trying to effect change, this putative benefit is a disability precisely because it thwarts effectiveness. A well-conceived governance structure should certainly embody safeguards to ensure that good decisions are made and bad decisions are avoided. There appear to be ample safeguards already in place in the form of judicial review, legislative oversight, executive branch budget authority, and press scrutiny to constrain a single administrator without

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42. *See Why Is This Trip Necessary? Regular Americans Should Be Interested,* TELCO COMPETITION REP., Aug. 1, 1996.

43. There is a big difference between expression of policy differences at the *policy-making* level (i.e., the legislature) and at the regulatory level, where established policies are administered. While the FCC has historically viewed its "quasi-legislative role" expansively, the Commission's primary responsibilities currently consist of implementing policy established by Congress in the 1996 Act.

44. Judge Posner, in *Schurz Communications, Inc. v. FCC,* said of the Commission's treatment of the financial interest and syndication rules:

> The impression created is of unprincipled compromises of Rube Goldberg complexity among contending interest groups viewed merely as clamoring suppliants who have somehow to be conciliated. The Commission said that it had been "confronted by alternative views of the television programming world so starkly and fundamentally at odds with each other that they virtually defy *reconciliation.*" The possibility of resolving a conflict in favor of the party with the stronger case, as distinct from throwing up one's hands and splitting the difference, was overlooked.

Schurz Comm., 982 F.2d 1043, 1050 (7th Cir. 1992) (quoting Evaluation of the Syndication and Financial Interest Rules, 6 FCC Rcd. 3094, para. 11, 69 Rad. Reg. 2d (P & F) 341 (1991)).

having to incur the costs of a multimember commission.[45] By way of analogy, if a car is already equipped with a variety of safety features, does it make sense to throw sand in the gears to prevent it from going too fast or operating too efficiently?

C. *Independence and Accountability*

The goals of independence and accountability are, of course, somewhat in conflict. As an "independent" agency, the FCC is expected to make decisions based on its expert judgment, without undue influence by the White House, Congress, or the regulated industries. At the same time, the FCC should be accountable for its decisions. Congress must be able to ascertain whether a particular FCC decision is consistent with the statute and with public policy. The courts must be able to discern the reasoned basis for Commission decisions, if those decisions are to be sustained.[46]

From either perspective, the single-regulator model prevails over the multimember commission. Precisely because the decisions made by multimember commissions are compromises, responsibility is diffused and accountability undermined. When called to account by Congress, the President, or the public, the chairman is inclined to defend an outcome as "the best we could do under the circumstances" rather than "this is what, in my judgment, was called for."

As noted previously, FCC decisions themselves are often opaque. It is often difficult to discern a rationale or underlying philosophy other than an effort to give everybody something (a result exacerbated by the multimember decision making). Oversight of the agency tends to be entirely

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45. This reform proposal would leave the protections of the Administrative Procedures Act in place. 5 U.S.C. § 551 (1994). Although some changes in the APA may be desirable in their own right (note the concern that excessive due process thwarts efficient decision making), the absence of similar formal protections in countries such as the U.K. is not to be emulated, especially in the aftermath of the WTO Agreement on Trade in Telephone Services, which calls for openness, transparency, and accountability in the regulatory process. *See GATS Reference Paper*, 36 I.L.M. 367 (1997) (This document's procompetitive regulatory principles were adopted (in whole or substantial part) by 65 World Trade Organization Member Countries on February 15, 1997.).

46. There are problems with both independence and accountability when the FCC becomes the target of too much pressure from too many contending factions. While 20 years ago congressional oversight of the FCC involved primarily answering to the Commerce and Appropriations Committees, the Commission today is the target of inquiries and demands from a growing number of individual legislators, congressional caucuses, etc. *See* Harry M. Shooshan III et. al., *Legislating Conduct at the FCC: Congress and the FCC Authorization Process*, BRDCST. FIN. J., March-April 1989; Harry M. Shooshan III & Erwin G. Krasnow, *Congress and the Federal Communications Commission: The Continuing Contest for Power*, 9 COMM/ENT 819 (1987); Erwin G. Krasnow & Harry M. Shooshan III, *Congressional Oversight: The Ninety-Second Congress and the Federal Communications Commission*, 10 HARV. J. ON LEGIS. 297 (1973), *reprinted in* 26 FED. COMM. B. J. 81 (1973).

political, that is, a response to interest groups, which perceive they have not gotten enough.[47] A single administrator will still seek compromises among contending factions, but will be more likely to impose his or her own views as to certain core principles.[48]

From the standpoint of independence, a multimember commission may be more favorable, although its independence is achieved in a rather perverse way and at considerable cost. Because, as noted earlier, individual FCC commissioners often owe their appointments to a particular politician or interest group, their votes tend to be heavily influenced accordingly. In fact, with a multimember commission, this is the *expected* result. This result is tolerable because the expectation is that, at least at the margin, these competing influences will cancel each other out. The question remains whether the risks avoided are worth the costs incurred (larger budget, less efficient decision making, diminished accountability, etc.). The answer also depends on how serious the potential liabilities of a single administrator are on this score.

There is a potentially greater risk that the FCC would not be as independent, if it were headed by a single administrator.[49] In theory, a single administrator could be more easily corrupted; that is, unduly influenced by political pressures or industry favors. For example, in the renewal of licenses[50] or enforcement of the political broadcasting rules,[51] a single ad-

47. In this environment, the first principle is "I want more," and the second is "More is not enough."

48. As an example, compare the local competition decisions of the FCC with those of the U.K.'s Office of Telecommunications (OFTEL). The FCC's interconnection order sought to be all things to all people; that is, to ensure big discounts for resellers of local service and uneconomically low prices for unbundled network elements. Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *First Report and Order*, 11 FCC Rcd. 15,499, 4 Comm. Reg. (P & F) 1, *clarified by Order on Reconsideration*, 11 FCC Rcd. 13,042, 4 Comm. Reg. (P & F) 1057, *reconsideration denied by Second Order on Reconsideration*, 11 FCC Rcd. 19,738, 5 Comm. Reg. (P & F) 420 (1996), *vacated in small part by Third Order on Reconsideration and Further Notice of Proposed Rulemaking*, 8 Comm. Reg. 1206 (1997) (further reconsideration pending). As a result, the FCC's "policy" may actually have undercut facilities-based competition. Key elements of this order were overturned by the Eighth Circuit Court of Appeals. Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), *cert. granted sub. nom.* AT&T Corp. v. Iowa Utils. Bd., 118 S. Ct. 879 (1998). OFTEL's approach has been consistently to promote facilities-based local competition. Only facilities-based providers are eligible for resale discounts and OFTEL has declined to order BT to unbundle its loops. Whether or not one agrees with OFTEL's philosophy or thinks it is relevant to local markets in the U.S., it is clearly discernable and consistently applied. *See* Harry M. Shooshan III, *Troubling Ironies and Inconsistencies: The MCI/BT Merger* (Feb. 25, 1997) <http://www.spri.com/reports/publist.htm>.

49. It should be emphasized that the restructuring proposed in this Article envisions the FCC as an independent agency; that is, free from direct control of any other executive branch department.

50. *See New Watergate Tapes Show Nixon Considering Attacks on Post Licenses,*

ministrator at the FCC might be inclined to advance the political agenda of the President to whom he owes his appointment. He might be more inclined to curry favor with a powerful legislator by acting to stifle controversial speech (e.g., obscenity and indecency).

These are serious concerns that deserve consideration. Ultimately, the question is whether these concerns warrant a multimember Commission (with all of its associated short-comings) or suggest other necessary reforms. This assessment, moreover, must be made in the context of the modern FCC.

In the first place, the likelihood of abuse in the licensing process has been greatly reduced by the introduction of auctions as a means for awarding licenses, including (for the first time) new broadcast licenses.[52] Elimination of the public interest standard for license renewals (or eliminating the license renewal process altogether) would reduce the opportunity for subjective interpretation and potential abuse. In the absence of such reforms, the best internal check against future abuses in the licensing process is the same as it has been in the past—the existence of a cadre of career professionals who can be expected to resist inappropriate intervention by a commissioner.

Similarly, to the extent that political broadcasting laws and rules are retained, they should be administered by career professionals under delegated authority (much as they are today). If this degree of insulation is considered inadequate, review of such matters by the agency head could be formally limited in some manner. Alternatively, enforcement of political broadcasting rules could be transferred to the Federal Elections Commission.

Regulation of other aspects of speech by licensees of broadcast stations (e.g., obscenity and indecency) should be left to the courts.[53] From a

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COMM. DAILY, Jan. 6, 1998.

51. *See* 47 C.F.R. § 73.1920 (1996) (Personal Attacks), § 73.1930 (1996) (Political Editorials) and § 73.1941 (1996) (Equal Opportunities).

52. *See* Balanced Budget Act of 1997, Pub. L. No. 105-33, § 3003, 111 Stat. 251, 265.

53. In fact, there are several examples of the FCC taking steps on its own to eliminate regulation of speech. In 1983, the FCC cited constitutional concerns for broadcasters in its repeal of several "underbrush" policies affecting programming and various commercial practices, preferring instead to rely on market forces to control broadcast abuse. Elimination of Unnecessary Brdcst. Reg., *Policy Statement and Memorandum Opinion and Order*, 54 Rad. Reg. 2d (P & F) 1043 (1983). More importantly, in 1987, the FCC abolished the Fairness Doctrine, which required broadcasters to both cover "controversial issues of public importance" and to afford a "reasonable opportunity" to air contrasting views. Syracuse Peace Council v. WTVH, 2 FCC Rcd. 5043, 63 Rad. Reg. 2d (P & F) 541 (1987). For a discussion of these actions, see Erwin G. Krasnow & Jack N. Goodman, *The "Public Interest" Standard: The Search for the Holy Grail*, 50 FED. COMM. L.J. 603, 617-18 (1998).

public policy perspective, it is hard to justify regulating the speech of those entities that are subject to the FCC's jurisdiction differently from the speech of those which are not.[54]

In sum, while there is increased risk of "corruption" with a single administrator, there are corresponding precautions that can be taken to reduce that risk,[55] many of which are also consistent with scaling back and redeploying FCC resources to carry out its new mandate.

IV. THE U.K. MODEL

The single-administrator model was adopted in the United Kingdom in connection with the privatization of a number of state-owned monopolies, including British Telecom (BT).[56] By most accounts, it has worked well.

Under the 1984 Telecommunications Act, primary regulatory responsibility was given to the Director General of Telecommunications (DGT), supported by the Office of Telecommunications (OFTEL) which essentially performs the same functions as the career professional staff (as opposed to political appointees) at the FCC. Other important functions are lodged with the Secretary of State for Trade and Industry (which is roughly comparable to the U.S. Department of Commerce) and the Office of Fair Trading. For example, the Secretary of State issues the licenses which the DGT is charged with enforcing. The DGT is appointed by the Secretary of State for a specified term and is directly accountable to Parliament. The DGT has extensive advisory support, including six independent advisory committees (e.g., Small Business, Disabled, and Elderly) and

54. The traditional rationales for the regulation of broadcasters are that (1) spectrum is scarce, and (2) broadcasting has greater impact than other media. *See* Red Lion Brdcst. Co. v. FCC, 395 U.S. 367 (1969); FCC v. Pacifica Found., 438 U.S. 726 (1978). Today, with 1,563 television and 12,227 radio stations, when 66% of households subscribe to cable television, and when viewership of broadcast television is declining, it is difficult to sustain these rationales. *By the Numbers*, BRDCST. & CABLE, Jan. 26, 1998, at 85.

55. The best course would be to limit the *agency's* jurisdiction in politically sensitive areas as suggested and give the President the same rights enjoyed with most other nonjudicial appointees. If Congress finds this approach too radical and contrary to its concept of the FCC as an independent agency (after all, the first question with independence is: "independence from whom?"), the agency head could be appointed to a single, four-year term subject to removal only for cause. (It should be noted that the last five FCC chairmen have served for an average of four years in that position and that it is highly unusual for someone to stay on as a commissioner after being replaced as chairman by a new President.)

56. The U.K. opted for sector-specific regulation, creating a single administrator for telecommunications, gas, electric, and water. Another model would have been that employed by states in the U.S. which typically have established one agency to regulate all utilities. Note that the U.K. is comparable in land mass to the state of Oregon, while it has about the same population density as the state of Massachusetts.

several expert panels consisting of leading academics, consumers, and business representatives.

Government policy in the U.K. is established differently than in the U.S. model in that "the Government" has more direct control. For example, much of the current telecom policy framework in the U.K. was set out in a 1991 White Paper issued by the Government.[57] Another significant difference in the two regimes is that much of the DGT's authority derives not from a general statute, but rather from enforcement of the various "licences" which are, in effect, agreements between the government and the private parties (e.g., BT), embodying certain obligations and commitments. Disputes over the DGT's interpretation and enforcement of a particular license or over proposed license amendments may be referred to the Monopolies and Mergers Commission. Until now, there has been very little judicial review of government decisions, since the U.K. lacks a tradition of parties appealing regulatory decisions to the courts.[58]

While the overall structure of government in the U.K. differs from that of the U.S., the single-administrator model has produced admirable results.[59] The DGT described the benefits of this framework in a submission to the government as part of its current review of utility regulation. These benefits include:

- An ability to balance the conflicting interests of consumers and shareholders, and of competitors and incumbents in a manner which transcends the short-term political pressures faced by the "Government of the day;"

- The ability to establish consistent policy and create a stable

57. U.K. DEP'T OF TRADE AND IND., COMPETITION AND CHOICE: TELECOMMUNICATIONS POLICY FOR THE 1990S (1991).

58. A notable exception was a successful challenge by Mercury Communications to the DGT's interpretation of a clause in BT's license relating to the cost standard to be used in setting interconnection prices. *See* Mercury Comm. Ltd. v. Director Gen. of Telecomm. [1996] 1 W.L.R. 48 (H.L. 1995).

59. One result has been to promote the selection of an extremely well-qualified individual as DGT. Don Cruickshank, who resigned as DGT on March 31, 1998, is an accountant with an MBA who served as a business consultant, a newspaper executive, the Managing Director of Virgin Group PLC (with supervision of the company's entertainment, media, airline, and travel business), and Chief Executive of the National Health Service in Scotland. The newly appointed DGT, David Edmonds, was a Managing Director for NatWest Group. Mr. Edmonds was responsible for an investment portfolio of £2.8 billion, 20 business units, and a staff of over 2,000. He was previously Chief Executive of the housing Corporation and held several senior civil service posts. *See David Edmonds, Director General of Telecommunications, Biographical Note* (visited April 11, 1998) <http://www.oftel.gov.uk/dgbio498.htm>. In short, the DGT's credentials are more like those of a top member of the U.S. Cabinet than an FCC commissioner.

and predictable regulatory climate so that investment commitments can be made; and

- The ability to promote competition and protect consumers in markets where competition does not exist.[60]

Guided by the DGT, OFTEL has established a much clearer, consistent policy for the introduction of competition. For example, OFTEL has consistently sought to encourage facilities-based competition, rather than relying on resale and on using piece-parts of the networks of the incumbent (i.e., BT). OFTEL sees such "infrastructure competition" as essential to its ability ultimately to withdraw from regulation of the telecommunications industry. OFTEL has also been much more explicit about the need for achieving an efficient rate structure and, not surprisingly, has been much more successful in achieving one than has the FCC.[61] By comparison to the opaque, formulaic FCC decisions, an OFTEL document is a lucid policy roadmap. One might disagree with the destination arrived at by OFTEL, but it is much easier to understand how they got there.

The U.K. model has not been without its recent critics. One respected commentator was led to support the multimember "American-style" commission out of concern that, with a single administrator, "[p]olicy becomes obscured by personality; *mano-a-mano* confrontations replace reasoned decisions."[62] While decisions may be more easily perceived (or cast by the press and affected industries) in such terms (in the U.K. there is, admittedly, only the DGT to blame), close observers of the American scene must find it remarkable how often the priorities of multimember commissions are viewed as the results of "the personal agenda" of the chairman.[63] In either case, press perception and "spin" by the parties seem like weak arguments for one model or the other.[64]

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60. DIRECTOR GEN. OF TELECOMM., REVIEW OF UTILITY REGULATION 14-15 (Sept. 1997) [hereinafter DGT SUBMISSION].

61. The FCC's job is admittedly complicated by the fact that it must share rate-setting responsibility with state commissions, while OFTEL has jurisdiction over long distance and local rates. On the other hand, the FCC has been notably reluctant over the years to wade into the turbulent political water of rate rebalancing—in part because of divisions among commissioners. *See generally supra* text accompanying notes 38-40.

62. Irwin Stelzer, *American Lessons for the Utility Regulators*, LONDON SUNDAY TIMES, July 20, 1997, at B10.

63. For example, under Reed Hundt, the FCC fought a series of pitched battles with broadcasters over children's television, political advertising, and qualification of the public interest standard. *See The Hundtification of TV*, BRDCST. & CABLE, July 8, 1996, at 62; Chris McConnell, *Hundt Pitches Kids Standards*, BRDCST. & CABLE, Jan. 29, 1996, at 18.

64. Irwin Stelzer advances a more compelling critique of the U.K. approach to regulation on process grounds. He expressed it well in his Institute of Economic Affairs Lecture

It must also be noted that the DGT has himself recommended replacing individual regulators with multimember commissions.[65] While acknowledging the potential disadvantages of a commission, the DGT suggests that a multimember commission would be "more accountable, provide more stability, and improve the quality of decision making."[66] He also sees benefits from having decisions made in open meetings.[67]

The DGT's recommendation must be considered in the proper context. In the first place, the current occupant of that position has announced that he will not seek reappointment from the new government when his seven-year contract expires in 1998. It is widely acknowledged that he will be "a hard act to follow." Second, his call for a commission is accompanied by a call for greatly expanded authority for the telecommunications regulator in the U.K., including new authority to set competition policy and expanded authority over broadcasting. The latter recommendation may be more politically palatable where it is not seen as further aggrandizing the DGT. A commission, moreover, would have room for others, who might be adversely affected by the transfer of authority to the proposed new agency. Finally, the DGT's recommendation may square with the role regulation will play in the U.K. but is clearly not transferable to the U.S., which already has two competition agencies in place and which has defined a very clear role for the FCC as the primary implementor and administrator of the 1996 Act.[68]

In sum, then, the merits of the DGT's recommendation should be considered within the unique circumstances that exist in the U.K. at the present time. His recommendation in no way diminishes the successes of the single-administrator model in the U.K. to date or undermines the arguments for reforms of the multimember commission model in the current environment in the U.S.

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on Regulation: "By rejecting America's open procedural model in favor of... 'the more secretive British framework,' the Government has denied the regulatory process the public credibility on which its success and acceptance crucially depend." Irwin M. Stelzer, Lessons for UK Regulation from Recent US Experience, Lecture on Regulation for the Institute of Economic Affairs (Dec. 7, 1995) (transcript on file with author). As long as the procedural rights established by the APA and rules governing ex parte contacts are maintained, this critique would be largely inapplicable to the single telecommunications regulator proposed in this Article. Moreover, as noted earlier, the "kabuki theater" nature of FCC deliberations in open meetings does little to enhance public credibility in the U.S. model.

65. DGT SUBMISSION, *supra* note 60, at 33.

66. *Id.* at 33-34.

67. *Id.* at 34.

68. It is also possible that the DGT has a model in mind other than the FCC per se. It cannot be that he wants to emulate the FCC's open meetings as a means of improving decision making or enhancing transparency and accountability.

V. CONCLUSION

The passage of the Telecommunications Act of 1996 and the debate about the future of the FCC suggest that the time is right to reconsider the Commission's structure. Reviews of the independent regulatory agencies conducted since the FCC was created in 1934 have not seriously considered the alternative model proposed in this Article—a single administrator.

The advantages of a single administrator over a multimember commission are substantial. Costs could be reduced. Decision making could be improved. Positive accountability could be enhanced. The potential disadvantages of a single administrator should also be addressed by appropriate changes in the FCC's jurisdiction, especially as it relates to broadcast license renewals and the political broadcasting rules. In general, if Congress is concerned about limiting the discretion of the single administrator, it can replace the Commission's "public interest" mandate with a more defined set of responsibilities much as it has done with enactment of the 1996 Act.

The success of the single-administrator model in the U.K. should be studied carefully. Under the direction of the DGT, OFTEL has, for example, established a much clearer, more consistent policy for the introduction of telecommunications competition. It has produced a much more stable and predictable regulatory environment.

The restructuring advocated in this Article is a constructive alternative to the calls for elimination of the FCC and a return to the common law. The FCC has been given an important job to do by the Congress in implementing the 1996 Act. Congress should now seriously consider how best to structure the FCC so that its job can be done as rapidly, efficiently, and effectively as possible.